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To: 'microsoft.atr(a)usdoj.gov'
Date: 1/28/02 11:39am
Subject: Tunney Act Comments: Microsoft Settlement

Unfortunatley, the e-mail I sent last week lost the footnotes.

This attachment should include them.

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January 24, 2002

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Reference: Tunney Act comments in United States of America v. Microsoft Corporation, Civil Action No. 98-1232 (CKK) and State of New York v. Microsoft Corporation, Civil Action No. 98-1233 (CKK).

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With copies to: Interested Parties

From: Ronald R. Cooke
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The Settlement Proposed By The Justice Department Overlooks Reality

Consumers within the Information Systems industry have expressed their skepticism about the settlement proposed by the Justice Department. In a poll of readers, for example, ZDNet asked: "Did Microsoft get off easy in the DOJ settlement?" Seventy four percent of the respondents said "Yes". To quote columnist David Coursey, " Nobody is precisely sure what it means, but the total effect seems little more than a hand slap .... Prohibitions that exist in one section seem to be rendered meaningless by another".[1]

Consumer and industry respondents to the Tunney review process will probably contend that the proposed remedy does not effectively end the anticompetitive practices, will not materially deprive the wrongdoer of the fruits of the wrongdoing, and will do virtually nothing to ensure that the illegality does not recur. The terms of the settlement are much too vague to be of much use. They can be manipulated and rendered ineffective through the legal process. The enforcement mechanism is inadequate. And finally, there is no clear cut way to prohibit monopolistic behavior.

There is a more fundamental issue, however, that has not been adequately addressed by the process of law. It can be expressed as a simple question: How much unconstrained power do we want one single company to have? As the Enron debacle has demonstrated, this is not an idle question. Unrestrained corporate behavior can severely damage consumer rights.

Microsoft has demonstrated that it can dominate the thinking of the PC Culture that it so zealously nourishes. It has an overwhelming influence over the press - and therefore - the opinions of an uncritical public. Within the information systems industry, Microsoft is acknowledged to have indisputable economic, political and cultural power. Comments by members of congress suggest this company also has a growing influence over the legislative process.

Given its announced strategic plans, it should be obvious this company wants more. Much more. Microsoft wants to wield the same kind of influence over the entertainment and communication industries that it does over the computer industry. It currently has aggressive initiatives to dominate the services and content of the Internet and is pressing forward with plans that will

[1] Quotation from: "MS settlement reads like a fairy tale". David Coursey, ZDNet, November 5, 2001.

effectively manage the access, distribution and use of networked consumer entertainment. Mobile and location technologies will be used to penetrate additional consumer services. .Net will drive the consumer to Microsoft approved content and services. If these initiatives are successful, this single company will be in a position to dictate how we create, store, edit, access, distribute and use all kinds of electronic information. Worldwide. Across three industries.

The reality of this situation raises a number of questions. Given its growing political and economic power, why do we believe that Microsoft will feel compelled to abide by the proposed settlement terms? Will they modify Microsoft's business strategy? Product plan? Will they prevent Microsoft from using integration, bundling and tying as weapons to lock out competitors in three industries? Will the proposed behavior monitoring process guarantee the delivery of reliable products? Improve consumer security? Prevent the abuse of corporate power? Ensure open markets? Encourage competitive innovation?

It would appear that the answer to all of these questions is a resounding "NO". If that is true, then how can any reasonable person claim that the proposed settlement serves the public interest?

Who Is The Consumer?

Consumers have the right to expect that our federal institutions will deliver a settlement that has an immediate, substantial and permanent impact on the restoration of competition within the information systems industry.

But, who is the consumer?

Media and political personalities frequently project the image that all "consumers" are deficient, clueless and vulnerable. It is an image favored by self proclaimed consumer protection groups. Consumers are easily victimized and thus considered in need of protection. Hence in the Microsoft anti-trust case, both the Justice Department and the presiding Judge were concerned that the "consumer" had been victimized by excessive software prices and a lack of choice. This somewhat ill-defined person had been forced to purchase Microsoft software through a captive retail channel and may have been overcharged.

In reality, this image of the "consumer" is misleading. If we want to reach a settlement that protects both personal and institutional rights, we must first agree on a definition for the word "consumer" that incorporates all classes of buyers. For the purposes of this settlement agreement, therefore, we must consider two broad classifications of the concept "consumer".

There are personal consumers and there are Enterprise consumers.

Personal consumers engage in personal consumption. This happens when people make purchases for themselves, their families, their friends or anyone (or thing) else that commands their interest. They use their own money. Typical purchases include food, clothing, housing, vehicles and so on. Personal consumption accounts for roughly two thirds of America's GDP.

Enterprise consumers spend money that belongs to the Enterprise. They buy products, property or services for their employer or their business. Broadly defined, Enterprise consumers include any entity defined by the standard industrial classification codes: i.e. insurers, manufacturers, retailers, hospitals, educational institutions, government agencies, personal service businesses and so on. Enterprise consumption accounts for approximately one third of America's GDP.

Both segments of America's consumer population must be protected from Microsoft's assertive marketing power. We must not leave either group of technology buyers in the position that they will be forced to chose key products and services from one vendor, good or not, on terms and prices they can not evade.

One of the more glaring problems with the proposed Microsoft settlement is that while Federal and State authorities have properly reacted to personal consumer complaints, they have failed to deal in a meaningful way with the problems of the Enterprise consumer. Industry wide issues include:

- Enterprise networks have become incredibly expensive and difficult to maintain.
- Existing PC operating systems are hard to manage and very costly to own.
- Internet and Intranet security problems have become so bad that they threaten electronic commerce and the viability of Enterprise operations.

There are multiple industry reports that address these issues in great detail. It is worthy to note that excessive information system costs have been calculated in the $ billions per year and that industry publications continue to report on the related management and operating problems. It is also clear that these impediments will continue to plague the Enterprise consumer because there is no effective competition for the architectural concepts promoted by the dominant vendor.

In this legal action however, Microsoft's alleged disregard of consumer needs was never pursued. There appear to be several reasons: some political, some practical, and some due to the inherent obsolescence of the Sherman Antitrust Law. But the issues remain:

- If PC operating system development has been paralyzed by the domination of a single vendor, has the consumer been harmed? And if the products are defective, what is the burden of liability?
- If network systems design has been primarily driven by the product plan and business model of a single vendor, has the consumer been harmed? And if the underlying system design was dysfunctional, what is the burden of liability?
- If a vendor, in order to deflect competition, announces products that do not exist, or products that never make it to market, has the consumer been harmed? And if the consumer was mislead, at what point does this constitute consumer fraud? What is the associated liability?[2]
- If consumer security and safety have been jeopardized by deficient systems architecture and defective products, what is the vendor's liability?[3]

The complaints against Microsoft are far more numerous than those covered by this narrowly defined legal action. If the court wishes to impose a meaningful settlement on Microsoft, it will have to consider both the concerns of this specific case and the underlying intent of the Sherman Act. There is case law and there is the reality of dealing with an overwhelming marketing machine that is essentially able to set its own agenda.

This reality puts the court in a quandary. If the court is to be forthright in its desire to protect the consumer, it must provide substantial relief for both personal and Enterprise consumption. It will have to deal with both the specific and the ambiguous. It must certainly expand the interpretation of the Sherman Act. And finally, the court will have to make its findings with the knowledge that this settlement will have a bearing on future actions against AOL/Time Warner.

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[2] The announcement of non-existent products was an issue in the Justice Department's case against IBM. It puzzles me why Justice chose not to pursue this issue in its development of a case against Microsoft.

[3] The National Academy of Sciences has recommended the creation of laws that would establish vendor liability for security breaches that are the result of vulnerable software products.

Microsoft The Company

Microsoft's corporate culture is driven by the mantra of revenue growth, institutional power and market control. Software is developed to gain market share or to demolish competition. Software defects and chronic insecurity have been institutionalized as components of the product plan.

Microsoft does not have to be driven by consumer wants and needs. Microsoft is free to be driven by whatever strategy protects its revenues and extends its power into additional markets.

Microsoft has been able to adopt competitive software concepts within its Windows architecture, thereby rendering the competitive software irrelevant. Examples include the incorporation of the Internet Explorer browser into the Windows user interface in order to destroy Netscape's Navigator and the inclusion of "Java like" features in the company's .Net strategy, a ploy that will eventually render Java redundant within the Windows environment.

When faced with standards based competition, Microsoft has frequently been accused of using an "embrace, extend, extinguish" strategy to render the standard useless. Microsoft's version may even flaunt the concept of "open standard" by restricting Windows clients from working with any platform other than a Windows server.

Microsoft has convinced a wide range of technologists, journalists, legislators and consumers that it has the exclusive wisdom to provide software innovation.

This - of course - is absolute nonsense. Microsoft is not the only company that understands the fundamentals of software technology. Were it not for the company's monopoly control over the market, consumers would be able to purchase a far superior PC operating system. Other vendors have developed, and are marketing, embedded operating systems with better technology and excellent reliability. Enterprise users have embraced a variety of alternative server operating systems because they have superior reliability and a lower cost of ownership. There are certainly alternative ways to build consumer friendly Internet, e-mail, word processing, spreadsheet, graphics and data base applications. And there are many companies that develop software for the cell phone, PDA, set top box, in-home server and game markets.

Unfortunately, few alternatives can effectively compete against Microsoft's marketing power. This company continues to use integration as a predatory weapon. Competing products, services and content will be hobbled - and thus less desirable.

Management has a vision. Microsoft plans to dominate the computer game, cell phone and PDA/HPC (Personal Digital Assistant/Handheld PC) markets, will force its way into the cable business and fully intends to be a leading provider of Internet services. These are key revenue growth strategies. The company's XP operating system is important because it drives Microsoft's largest revenue stream and the future of the company's .Net strategy. The Stinger cell phone and Pocket PC HPC OS launches open up new recurring mobile network revenue opportunities. The XBox game platform opens a strategic path to the convergence of entertainment and computing in the home. The company is actively tying its computer and communication software product strategy to its Internet services and content strategy. The Internet gives Microsoft a virtually unlimited marketplace that can be molded to the company's operating philosophy. Hailstorm and Passport fit perfectly into this scenario. Network clients using Microsoft software will be tightly integrated with Microsoft application and content servers.

This is, after all, what convergence is all about.

Unfortunately for the consumer, management's vision has a potential downside. Microsoft will be able to demand access to all of the software we use, modify it with or without our knowledge, and make copies of our files. This company will be in a position to monitor our use of the Internet, our political philosophy, our purchase behavior, and our friendships.

Will Microsoft actually do this? Will a hacker be able to do the same thing? Does the consumer really want to be this vulnerable?

We can understand that Microsoft's business model is driven by the visceral desire to absolutely dominate all high volume software applications. We can also understand that the company's prospects for revenue and profit growth are interdependent with the accumulation of power over the consumer's use of computing technology within the computer, communication and entertainment industries.

It is time, however, to ask one simple question: Does this ubiquity serve the public interest?

On the one hand we acknowledge Microsoft's accomplishments, the intensity of its vigorous pursuit of new markets and its right to function as an independent business. But on the other hand, the court must fashion a remedy that incorporates genuine protection for the consumer. The PC era was lots of fun. The Internet era was a wild ride. But going forward, Enterprise and personal consumers must have cost effective software that is reliable, predictable, useful, secure, easy to manage and open.

Will a court imposed settlement provide the key?

Alternative Remedies

Nine States[4], along with the District of Columbia, have presented an alternative proposal of remedy that would, if implemented, partially correct these deficiencies. This proposal has credibility because it directly addresses the findings of this specific case and establishes remedies that are consistent with prior court tests that judged the validity of relief from infractions of the Sherman Antitrust Law.

1. Microsoft would have to offer a stripped version of Windows.

   Although much thought must go into the implementation methodology of this recommendation, it could have the effect of reducing consumer costs by encouraging the development of alternative personal computing appliances with competitive applications software. It would also have the effect of making it more difficult for Microsoft to exclude competition by tying its operating systems to its applications, content and services.

2. Microsoft must support Java.

   Enterprise consumers have espoused Java as a highly useful programming language. Because it is an interpreted, object oriented, platform independent language, Java can be used to reduce the cost of developing, deploying and supporting networked applications. Despite the obvious benefits to the consumer, Microsoft wants to kill Java by making it irrelevant within a Microsoft controlled programming environment. Forcing Microsoft to give its full support to Java would give the Enterprise consumer and applications software developer incremental choice in the selection of development environments.

3. Microsoft would be compelled to make Office available for all popular operating systems.

   Consumers have been forced to accept either Apple or Microsoft PC operating systems as a defacto prerequisite for using the company's Office suite. If Office were made available for all popular non-Microsoft operating systems, consumers would have a wider choice of operating system environments. In addition, this recommendation would encourage the development of

[4] California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, and West Virginia.

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competitive PC operating systems, presumably based on architectures that could deliver superior reliability, function and security.

Given a carefully constructed court approved implementation and supervision methodology, these recommendations would be most helpful to the restoration of competition within the PC and network appliance software industries. However, if we want to preserve an open and competitive market, and if we want to be vigilant in our support of acceptable corporate behavior, then we should consider three additional recommendations.

4. Restrict Microsoft from the Embedded Systems market.

   There are a number of reasons to restrict Microsoft's participation in the embedded systems market[5]. For the purposes of this specific settlement, however, we must focus our attention on the restoration of competition and innovation within the PC market. Going forward, we also need to ensure consumer choice in the markets for set top boxes, entertainment devices and communication appliances, as well as network based content and services. As discussed above, Microsoft's announced strategy is to tie its software products to its services and content businesses. If Microsoft is successful with these initiatives, this company will have greatly extended its marketing power and will be in a position to monopolize segments of the entertainment and communications industries.

   For a period of seven years, therefore, Microsoft should be prohibited from selling any embedded systems software products, including CE, its derivatives and any comparable products. If there is to be any credible competition for Microsoft's existing monopoly over PC operating system architectures, it is most likely to come from the manufacturers of network attached appliances. Over time, the embedded software within products will increase in sophistication. There is no reason why these system architectures can not be used to provide the consumer with the whole range of PC applications.

   Microsoft would be compelled to establish a separate company for its CE, Stinger, XBox, PocketPC, set top box and all other currently active embedded systems product efforts within 8 months of signing a settlement agreement. Microsoft would not be allowed to own any part of the company or its stock for a period of 7 years. Any funding for the newly spun-off company must come from sources in which Microsoft has no financial interest. Five years after the spin-off, Microsoft would be allowed to start a new embedded software development effort that could be offered for sale no sooner than seven years after signing the settlement agreement.

   Placing restrictions on Microsoft's embedded systems efforts will reduce the company's ability to dominate the related communication and entertainment markets. Microsoft would be encouraged to establish partnerships with the existing content and service companies as well as the manufacturers of embedded hardware and software products. These markets can then evolve in ways that are not tied to a single company's business strategy and revenue plan.

5. Place Microsoft under Court Supervision

   It is difficult to imagine how the proposed settlement terms will prevent Microsoft from engaging in anti-competitive behavior. One would have to assume that Microsoft is immune from the temptations of corporate power. It would be helpful, therefore, if Microsoft were placed under the supervision of the court. A methodology must be developed that permits complaints of wrongdoing to be reviewed in a prompt and fair manner. Fines and restrictions, where necessary and justifiable, should be imposed by the court after a hearing process.

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[5] A more detailed discussion of the basis for the recommendations and comments presented in this document may be found in my book: "CyberCarnage: Everything We Own Is Obsolete"

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Court supervision should reduce the need for further Justice Department action and could be used to establish the parameters for pending civil actions. The intention is that Microsoft could engage in any permitted business practice, strategy and tactic it wished, so long as the court agrees that its actions are lawful. The period of supervision should be continued until the court, by its own determination, believes that supervision is no longer justified.

6. Insist on a Code of Conduct

   If we assume that we do not want our larger corporations to be driven solely by the mantra of revenue and profit growth, then any company that achieves a dominate position within any single industry has an obligation to adjust its behavior to operate in the public interest. The usual mechanism is through the imposition of government regulation. Absent this solution, the alternative is to insist that the dominant company have a set of enforceable standards against which it is possible to judge individual employee conduct.

   Under court supervision, Microsoft should be compelled to adopt a Code of Conduct. Specific sections should address this company's relationship with competitors, suppliers, consumers, and partners. A methodology must be developed that permits complaints of wrongdoing to be reviewed in a prompt and fair manner. Fines and restrictions, where necessary and justifiable, should be imposed against individual employees.

It would appear that these recommendations can be implemented in a fair and equitable manner. The objective is not to unduly punish Microsoft. The Third and Fourth Waves of computing are history. We must look forward, not backward. Punishment is less desirable than the creation of a competitive, needs driven, marketing environment for the consumer. It would appear that all six recommendations, if implemented as a whole, would have a minimal impact on Microsoft's existing revenues and profits. There would be little interference with the company's PC and server software business. Over the next 5 to 7 years, the net effect is that Microsoft would not grow as fast and it would have to look to industry partners for some products compliment its .Net strategy.

For the consumer, however, the restoration of competition within the PC industry will be enormously beneficial. New innovation can take the form of products that are easier to manage, more reliable, more secure, and less costly to own.

The Sherman Antitrust Law

As a piece of legislation, the Sherman Antitrust Law appears to be obsolete. The Sherman Antitrust Act of 1890 was designed to deal with the political and monopoly power of (frequently interlocking) trusts. Specific companies had pricing, availability, distribution and product power over the consumer. Relief came in the form specific restrictions to business practices and monetary punishment.

The Sherman Antitrust Law does not address the defacto standards issue. Over the last 75 years, the telephone, teletype, electric, water, radio, entertainment, and television industries have been characterized by the evolution of increased concentration based on a company dominated list of defacto standards. Within the public services industries, regulation has been used to ensure that these standards are beneficial to the public interest. There are additional examples of industrial standards that have been promoted for the benefit of all potential players. When RCA set the defacto standards for color television, for example, multiple industry participants were able to adopt them for their individual benefit.

Dominant players set the rules of competition and corporate existence. All industries are vulnerable. Airlines, banking, insurance, manufacturing, retailing - it does not matter. The potential for domination - whether by marketing power, financial strength, or technology - exists.

And if 21st century industries tend to gravitate toward single standards established by one dominant player, then we need to ask multiple questions:

- What is an open and competitive market?
- What is the basis for determining economic concentration?
- What is market domination?
- Should a company be allowed to use it's domination of one market to leverage its customer base into the domination of other markets?
- If the consumer is forced to purchase defective and/or dysfunctional products because there is no viable alternative, what is the dominant company's implied liability?
- What are consumer rights? (How can they be measured?)
- At what point does the power of the dominant player jeopardize consumer rights?
- What is a fair penalty for jeopardizing consumer rights?
- If a market is dominated by a single company, at what point does this imply that it must assume a fiduciary responsibility to act in the public interest? And what are the guidelines for corporate behavior? How will they be enforced?
- How much political and economic power do we want a single company to accumulate within a specific market?
- And finally; What is the mechanism for restructuring competition?

Obviously, there are many more questions that need to be addressed if the Sherman Act is to be rendered relevant to the realities of 21st Century Corporations. The purpose of this more limited discussion, however, is to demonstrate the deficiencies of the Sherman Act when considering the specific parameters of this settlement. Neither the Sherman Act, nor the proposed settlement, address the realities of existing market structures, emerging technologies, defacto standards, the issues of convergence or the use of 21st century corporate power.

Since the Sherman Act currently provides inadequate guidelines for establishing what will be - essentially - public policy, then the court has two choices:

- Interpret the law within the narrow confines of this case using legal precedent (which essentially will let Microsoft off the hook); or
- Broaden the interpretation of the Sherman Act in order to protect the consumer from further harm that may occur in the future (which will require the Court to consider issues and questions not necessarily documented within the scope of this case).

Either way, the court's determination will be sent to the Supreme Court for resolution.

Conclusion

Since the proposed Justice Department settlement provides only limited relief for a very narrowly defined case, it will fail to provide the public policy guidelines that are so desperately needed to protect the consumer from the abuse of corporate authority. It does nothing to relieve the increasing concentration of political, economic and marketing power that is now occurring within the computer, communication and entertainment industries.

We are thus faced with two realities. On the one hand there is the reality of the specifics of this case and the proposed settlement remedies. On the other hand, there is the reality of the need to maintain open and competitive markets for the products, services and content. A really good settlement will bridge these two realities.

As for the Sherman Act? Corporate governance is out of control. Unfortunately, we all know that Congress will not act until it is politically expedient to do so. Failure to act implies acceptance of the status quo. Competition will fade. Corporate power and influence will be concentrated. More Enron's will happen. By the time congress acts, if at all, it may be too late to impose meaningful reform.

So it is up to our court system, and perhaps the Commissions of the European Union, to both make and execute the guidelines we need to protect the consumer. We want our corporations, including Microsoft, to be successful. We expect them to grow their revenues and profits. We want them to pursue new business opportunities. But we also want them to operate within open and competitive markets so that consumers have an opportunity to purchase the products, services and content they want, at a price they can afford, and on terms that make them practical. That means that our legal system must guard against the potential abuse of corporate power and the inherent problems of market domination. In this settlement, we are asking the court to define those guidelines in a way that protects consumers from the potential of future abuse.

Is that too large a task? Too sweeping a challenge? Too far from the specifics of this case? I think not. It is the reality of 21st century technology and market structures. Convergence, after all, implies consolidation. And consolidation breeds domination.

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